

89-505

NO. _____

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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

EDDIE THOMPSON, JR.

Petitioner

vs.

HONORABLE RICHARD L. HINTON,
FLEMING CIRCUIT JUDGE

Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY**

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QUESTION PRESENTED

WAS PETITIONER ENTITLED TO A WRIT OF MANDAMUS, COMPELLING THE HONORABLE JUDGE HINTON TO RULE UPON PETITIONER'S TIMELY PRESENTED RULE 59.05 MOTION, WHEREIN JUDGE HINTON FAILED TO GIVE FULL FAITH AND CREDIT TO A FEDERAL JUDGMENT AND THAT FAILURE CAUSED PROLONGED AND UNDUE DELAYS, DENIED PETITIONER ACCESS TO COURT AND PETITIONER HAS NO OTHER REMEDIES?



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ARTICLE IV, § 1—Full Faith and Credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State, and congress may by general laws prescribe the manner in which such Acts, Records and Proceedings shall be proved, and the effect thereof.

28 U.S.C. § 1257

Final Judgments or Decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows;

(3) By Writ of Certiorari, where the validity of a treaty of statute of the United States is drawn in question or where the validity of a state statute is drawn in question on the grounds of it being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties, or statutes, or commissions held or authority exercised under the United States.

IN THE
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No. _____

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Respondent

**PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY**

Petitioner, Eddie Thompson, Jr., (hereinafter Petitioner) respectfully prays that a Writ of Certiorari issue to review the Judgment of the Kentucky Supreme Court, entered in an unpublished Decision on June 29, 1989. (App. P. 19a)

OPINION BELOW

The Order of the Kentucky Court of Appeals was entered on September 28, 1988. (App. P. 17a). Notice of Appeal was filed on October 4, 1988. NR P. 17 (App. P. 1a)

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

Judgment was entered by the Kentucky Supreme Court on June 29, 1989 (App. P. 19a), and the Petition for Writ of Certiorari is filed within ninety (90) days of that date.

The following decisions of this Court sustain Jurisdiction of this Court.

Angel v. Bullington, 330 U.S. 183, 91 L Ed 2d 832,
S Ct 657 (1947)

Durfee v. Duke, 375 U.S. 106, 11 L Ed 2d 186, 84
S Ct 242 (1963)

Haines v. Kerner, 404 U.S. 519, 92 S Ct 504 (1971)

In re Murchison, 349 U.S. 133, 99 L Ed 942, 75 S
Ct 623

Titus v. Wallick, 306 U.S. 282, 83 L Ed 649

STATEMENT OF FACTS

On August 1, 1986, Petitioner filed a complaint against the City of Covington and Howard Hodge, styled *Eddie Thompson, Jr. v. City of Covington and Howard Hodge*, Kenton Circuit Court No. 86-CI-1266, (hereinafter 86-CI-1266), seeking to collect rent due on a Section 8, Housing Assistance Payment Contract, illegally withheld by the City of Covington.¹

On September 23, 1986, after disqualifying himself, and over Petitioner's objections, the Honorable Raymond E. Lape, Jr., Kenton Circuit Judge³, doubling as Chief Regional Judge, assigned the Honorable Richard L. Hinton, Fleming Circuit Judge, as special Judge to hear the case.

Petitioner objected to the Honorable Judge Lape arbitrarily appointing any Judge, as the appointment was in violation of

¹ Petitioner had previously filed a complaint in U.S. District Court alleging the same facts in a civil rights action (42 U.S.C. § 1983), styled *Thompson v. Hendrick and Condit*, No. 78-05. The District Court "Dismissed Without Prejudice." The Sixth Circuit affirmed, 81-7773, Certiorari was denied, October 17, 1983, No. 83-481, 464 U.S. 916.

² The effect of the words "Dismissal Without Prejudice" is to prevent the decree of "Dismissal Without Prejudice" from operating as a bar to subsequent suits, (while) "Dismissal with Prejudice" is an adjudication on the merits, and final disposition, barring the right to bring or maintain an action on the same claim or cause. It is res judicata to every matter litigated. Black's Law Dictionary — Fifth Edition.

³ K.R.S. 23A.020 Circuit Judges are elected from their respective Judicial Circuits; Judge Lape from the 16th Circuit and Judge Hinton from the 19th Judicial Circuit. The argument here is that in order for a Judge in the 16th Judicial Circuit to appoint a Judge in the 19th Judicial Circuit, the Judge would have to be elected in both Circuits. E.g. elected in both Circuit as a Judge of the Court of Appeals. In addition Judge Lape refuses to enter a final appealable Order in three (3) cases involving Petitioner. See *Thompson v. Lape* U.S. Supreme Court No. 88-2028. Petitioner has unsuccessfully attempted to get an Order preventing Judge Lape from appointing Judges out of his Judicial District in *Thompson v. Stephen* U.S. Supreme No. 86-1175 Appeal Dismissed for want of Jurisdiction. March 2, 1987. 480 U.S. 901.

State Law (K.R.S. 26A.015(3)⁴ and because Judge Lape's appointment of Judges out of districts other than elected in, was in violation of the One Man, One Vote Rule, and the Due Process and Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. Citing *Sims v. Amos*, 336 F Supp 924.

On January 14, 1987, Judge Hinton held a hearing. (NR 12, App. P. 12a)⁵

At the hearing, Mr. Ronald L. McDermott, counsel for the City of Covington and Mr. Hodge, admitted that: (1) the Kenton Circuit Court had jurisdiction, (2) the complaint stated a cause of action, (3) his motion to dismiss was not well grounded, and (4) no Court had made a decision on the merits of the case.⁶

After thoroughly questioning Mr. McDermott concerning the "dismissal without prejudice"² of the suit filed in Federal Court,¹ Judge Hinton orally ordered Petitioner and Mr. McDermott to file a memorandum of law relative to the essence of "dismissal without prejudice."^{2, 7}

As a result of the hearing, Petitioner filed a motion for the Court to enter its finding of facts and conclusions of law on the January 14, 1987 hearing. (NR 13, App. P. 13a)⁵

No response was filed to the Motion and Judge Hinton made no ruling on the Motion.

⁴ K.R.S. 26A.015 (3) Any justice or judge of the Court of Justice disqualified under the provisions of this section shall be replaced by the Chief Justice.

⁵ Docket sheet of *Thompson v. City of Covington and Howard Hodge* 86-CI-1266 (App. P. 12a).

⁶ That being a contract between Eddie Thompson, Jr., the City of Covington and a tenant, whereby the City of Covington was illegally withholding the rent.

⁷ Mr. McDermott literally refused to answer questions concerning the "dismissal without prejudice" and at the close of the hearing stormed out of the Court room.

Mr. McDermott completely ignored Judge Hinton's oral instructions to file a memorandum of law relative to a "dismissal without prejudice," instead, Mr. McDermott filed a Motion to Dismiss and Pretrial Memorandum. (NR 16, App. P. 13a)^{5, 8}

In compliance with Judge Hinton's oral order to file a memorandum of law relative to the essence of a "dismissal without prejudice"² of a suit filed in Federal Court,¹ Petitioner filed a memorandum of law citing 9 U.S. Supreme Court Decisions standing for the proposition that a "dismissal without prejudice" is not a Decision on the merits. (NR 17, App. P. 13a)⁵

At the hearing held on April 22, 1987, Mr. McDermott: (1) had failed to answer the complaint, (2) had failed to answer Petitioner's Motion for Default Judgment (NR 11, App. P. 13a),⁵ (3) had failed to file the memorandum of law relative to "dismissal without prejudice,"² and (4) tried to argue that the Federal Suit,¹ barred the present action, even though he (Mr. McDermott) had admitted at a hearing on January 14, 1987, that "no Court had made a decision on the merits of the case."⁹

On May 4, 1987, pursuant to a letter from Judge Hinton (App. P. 15a),¹⁰ the Kenton Circuit Court Clerk entered two

⁸ On the docket sheet, the Kenton Circuit Court Clerk inadvertently entered, "Plaintiff move to Dismiss".

⁹ Petition argued at the hearing that the City of Covington was collateral estoppel from arguing that no contract existed, since no answer was filed to the complaint denying the contract existed in Federal Court.² Petitioner presented annexed,² to Judge Hinton to be filed in the Record.

¹⁰ In the letter, filed April 4, 1987, (App. P. 15a), Judge Hinton instructed the Kenton Circuit Court Clerk to "Please give notice of order and summary judgment to the attorneys of record". Judge Hinton did not say whom to enter summary for in his order entered May 4, 1987, NR 22, (App. P. 13a).⁵ Since Petitioner is not an attorney, Judge Hinton didn't intend for the Clerk to serve a copy of his (Judge Hinton's Orders of April 4, 1987. (NR 22, 23,⁵) upon Petitioner. How could Judge Hinton Grant the City of Cov-

(2) Findings of Facts, Conclusions of Law and Orders. (NR 22, 23, App. P. 10a and 16a)⁵

On May 12, 1987, Petitioner filed a timely Rule 59 Motion. (NR 24, App. P. 14a)⁵

Judge Hinton held another hearing on July 14, 1987 (NR 25, App. P. 14a)⁵ where he (Judge Hinton) had a Court Reporter to take down the whole proceedings.

Petitioner restated all relevant facts necessary for a favorable ruling on the merits of the case and answered all of Judge Hinton's concerns about collateral estoppel and res judicata, without comment or contradictions from Mr.

ington Summary Judgment before the City of Covington Answered the complaint? One of Judge Hinton's Orders of May 4, (NR 23 App. P. 14a, 16a) was that the "City of Covington be permitted to answer". It is obvious at this point that Judge Hinton was going to be less than fair.¹¹

¹¹ So in order to know where the Honorable Judge Hinton is coming from, we need to know where the Honorable Judge has been? We do know that Supreme Court 76.36(7)(h) mandate that briefs *Shall* be required in the Kentucky Supreme Court, by the "real party in interest" on behalf of the Judge against whom the appeal is taken, provided, however, no attorney shall be required or permitted to file such brief where to do so would conflict with the interest of his client. The failure of The City of Covington to file a brief on behalf of Judge Hinton is an admission of a conflict of interest by the Honorable Judge Hinton.¹²

¹² Conflict of Interest, generally, when used to suggest disqualification of a public Official from performing his sworn duty, term "conflict of interest" refers to clash between public interest and the private pecuniary interest of the individual concerned. Black's Law Dictionary, Fifth Edition. In this case, it could have been the appointment by Judge Lape, Judge Lape has been setting on Three Case indefinite. (See *Thompson v. Lape* Supreme Court No. 88-2028). At any rate The Purported Response to Petition for Writ of Mandamus (Page 13-14 of Index of Ky Court of Appeals, (App. P. ____))¹⁷ is misrepresentation of facts, in that it failed to meet the criteria set out in CR 76.36 (2). i.e. KY CR 5.03. Not serving a copy of the purported Response of Judge to Petition for Writ of Mandamus (App. P. ____) on Mr. McDermott (Counsel for the City of Covington) is admission of a conflict. Not serving Petitioner was a denial of due process, but if one is denied access to Court, is there any due process.

McDermott, counsel for the City of Covington and Howard Hodge.

Judge Hinton failed to issue a ruling on the May 4, 1987, Rule 59 Motion or the hearing held on July 14, 1987. This was a violation of K.R.S. 454.350.¹⁵

In an effort to get Judge Hinton to issue a ruling on the Rule 59 Motion of May 4, 1987 and the hearing held on July 14, 1987, Petitioner filed a Motion for Judgment for plaintiff and/or for a final appealable order. No response was filed by Mr. McDermott, counsel for the City of Covington.

On February 28, 1988, John Hinton held another hearing, where Judge Hinton again heard all the relevant facts of the case, without contradictions from Mr. McDermott.

On June 15, 1988, Petitioner informed Judge Hinton by letter, Ex. A, Petition for Writ of Mandamus (App. P. 3a, 6a), that he (Judge Hinton) had not ruled on Petitioner's Rule 59 Motion of May 12, 1987 (NR 24)⁵ concerning Orders of May 4, 1987 (NR 22, 23,⁵ App. P. 10a, 16a); and requested the entry of an Order within ten (10) days.

Judge Hinton did not respond to Petitioner's letter of June 15, 1988.

On August 15, 1988, Petitioner filed a Petition for Writ of Mandamus to compel the Honorable Judge Hinton to rule on Petitioner's Rule 59 Motion.

Judge Hinton nor the "real party in interest" (City of Covington) filed a Response to the Petition for Writ of Mandamus.¹³

¹³ Ky CR 76.36 (2) provides . . . The party against whom relief is sought and the 'real party in interest' as defined in this Rule, Section (8), may within 10 days after the date of filing of the petition file a response, bearing proof of service as required by Rule 5.03, accompanied by a memorandum of authorities in support of his defense. This Rule does not contemplate a Judge only filing a Response under this Rule. The Rule says, "Judge and real party in interest" meaning both.

Without giving due consideraton to the undenied allegations in the Petition for Writ of Mandamus (App. P. 3a, 8a)¹⁷ and without giving Petitioner a hearing on the merits of his Petition, the Trial Court (Ky. Court of Appeals) concluded that, "The Fleming Circuit Court's May 4, 1987 Order disposed of all pending claims in that action and was final and appealable. CR 54.02"¹⁴

The Kentucky Supreme Court affirmed in an *unpublished* opinion. The Court observed in *dicta*, the very question before it, ". . . a timely motion filed pursuant to CR 59, in this case CR 59.05, should be ruled upon if properly presented. (App. P. 19a-20a)

¹⁴ The May 4, 1987 Order, (App. P. 10a) is no Order or Judgment that meet the criteria set out in Rule 54.02. Looking at the May 4, 1987 Order, we must smile as we ask ourselves, what were the pending claims disposed of in the May 4, 1987 Order. Rule 54.02(1) provides . . . When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross claim, or third-party claim, or when multiple parties are involved, the court may grant a final judgment upon one or more but less than all of the claims only upon a determination that there is no just reason for delay. The Judgment shall recite such determination and shall recite that the judgment is final. In the absence of such recital, any Order or other form of decision, however designated, which adjudicates less than all of the claims shall not terminate the action as to any of the claims, and the order or form of decision is interlocutory and subject to revision at any time before the entry of judgment adjudicating all the claims. (2) When the remaining claim or claims in a multiple claim action are disposed of by judgment, that judgment shall be deemed to readjudicate finally as of that date and in the same terms all prior interlocutory orders and judgments determining claim which are not specifically disposed of in such final judgment. If Judge Hinton though his Order of May 4, 1987, (NR 22, App. P. 10a),⁵ to be final, why did Judge Hinton hold hearing on July 1987 and February 28, 1988. (NR 25, 29, App. P. 14a)¹⁷

REASONS FOR GRANTING THE WRIT

WAS PETITIONER ENTITLED TO A WRIT OF MANDAMUS, COMPELLING THE HONORABLE JUDGE HINTON TO RULE UPON PETITIONER'S TIMELY PRESENTED RULE 59.05 MOTION, WHEREIN JUDGE HINTON FAILED TO GIVE FULL FAITH AND CREDIT TO A FEDERAL JUDGMENT AND THAT FAILURE CAUSED PROLONGED AND UNDUE DELAY, DENIED PETITIONER ACCESS TO COURT AND PETITIONER HAS NO OTHER REMEDIES?

In the instant action, Petitioner filed a Petition for a Writ of Mandamus pursuant to K.R.S. 454.350¹⁵ and KY CR 76.36.¹⁶

In this case, from the evidence Judge Hinton gleaned at the four (4) hearings he held (NR 12, 18, 25, 29,⁵ App. P. 13a, 14a), Judge Hinton recognized he had to give full faith and credit to the "dismissal without prejudice" of the federal law suit.¹

Judge Hinton and Mr. McDermott recognized that Petitioner was entitled to a favorable judgment. Judge Hinton and Mr. McDermott knew Judge Hinton's orders of May 4, 1987 were clearly erroneous. Judge Hinton instructed the Cir-

¹⁵ K.R.S. 454.350 requires Circuit Court Judges to issue written Judgment or Order within ninety (90) days and/or at the end of the month certify to the chief Justice all cases which have not been adjudicated and certify in writing the reason for delay.

¹⁶ KY CR 76.36 (7)(h) sets out the procedure to be followed when an appeal is taken against a Judge in the Court of Justice and concerns PERFORMANCE OF AN OFFICIAL ACT, the party appealing shall serve notice on the real party in interest as defined in this Rule, Section (8), who SHALL then be required to file a brief on behalf of the Judge against whom the appeal or cross-appeal is taken; provided, however, no attorney shall be required or permitted to file such a brief where to do so would conflict with the interest of his client. (8) REAL PARTY IN INTEREST. For the purpose of this Rule only, the term "real Party in interest" is any party in the circuit court action from which the original action arises who may be adversely affected by the relief sought pursuant to this Rule.

cuit Court Clerk to only service copies of his Order upon *attorneys of Record*.¹⁰ Mr. McDermott was the *only attorney of record*. Petitioner was pleading Pro Se.

Judge Hinton took the matter personally. Even though the law required Judge Hinton to sign an Order within 90 days,¹⁵ Judge Hinton refused to do so even after he was requested to do so. (See Complaint, App. P. 3a)

Under the procedure rules, once Judge Hinton refused to perform an official act, (in this case, sign an order denying or granting a Rule 59 Motion), he was in violation of K.R.S. 454.350¹⁵ and since the city was the real party in interest, Judge Hinton was in conflict of interest by *purporting to represent the real party in interest*. This was not Judge Hinton's fight.

Kentucky Statutory Law and Rules of the Kentucky Supreme Court require a Judge to disqualify himself in situations where a conflict exists. K.R.S. 26A.015 and KY SCR 4.300 Canon 3: A (4), (C)(1)(d)(ii), (iv).

It is well settled that:

The writ of mandamus is a remedy to compel any person, corporation, public functionary or tribunal to perform some duty required by law, where the party seeking relief has no other remedy, and the duty sought to be enforced is clear and indisputable. *Knox County v. Aspinwall*, 65 U.S 735, 24 Howell 376-386.

Kentucky Law is consistent with this Rule,

Under statute (K.R.S. 454.350) setting forth time within which judge, commissioner or hearing officer must issue judgment or report certification of reason delay occurs, to avoid prolonged indecision, mandatory writ shoud be used to rectify situation and if this be to no avail, then extreme remedy of removal is provided. *Dubick v. Dubick*, 653 S.W. 2d 652.

A body of law has developed that embraces the rule that

Pro Se complaints are to be liberally construed. *Haines v. Kerner*, 404 U.S. 519, 520 (1971)

No matter how inartfully pleaded, a Pro Se complaint must be held to less stringent standards than pleadings drafted by attorneys, and can only be dismissed if it appears, "beyond doubt that Plaintiff can prove no set of facts in support of his claim that would entitle him to relief." *Franklin v. Rose*, 765 F. 2d 82

One additional comment may be proper,

Legal consideration should not be disposed on a wooden application of the Rules of Civil Procedure. It should be clear to Appellee (Respondent) that it is contrary to the spirit of the Rules of Civil Procedure that decisions on the merits of a cause be avoided on the basis of procedural technicalities. The purpose of pleading is only to facilitate a proper decision on the merits. *Foman v. Davis*, 371 U.S. 178

In the Petition for Writ of Mandamus (App. P. 3a, 8a; page 9-10 of Index of Ky. Court of Appeals, App. P. 1a),¹⁷ it is alleged that Judge Hinton refused to rule on a Rule 59.05 Motion filed on May 12, 1987 (NR 24)⁵ to amend Order of May 4, 1987 to conform to the proof in the case and/or motion for final and appealable order.

The City of Covington (real party in interest) did not deny the allegations in the Petition for Writ of Mandamus, did not file a Response to the Petition for Writ of Mandamus, and did not file a brief in the Kentucky Supreme Court as required by CR 76.36(7)(h).¹⁸

¹⁷ In the docket sheet of the Kentucky Court of Appeals, (App. P. 1a), the Petition for Writ of Mandamus is listed as pages 9 and 10. The Petition for Writ of Mandamus filed by Petitioner included a Cover, a letter, and an Affidavit totalling six (6) typed pages. (App. P. 3a-8a)

¹⁸ Under CR 76.36 (7)(h), Judge Hinton became a client of the 'real party in interest' (City of Covington). The docket entry, Response to Petition for

CR 59.05 provides as follows: "A motion to alter or amend a judgment or to vacate a judgment and enter a new one, shall be served not later than 10 days after entry of the final judgment." (Emphasis added) Under Kentucky law, when Petitioner filed his Rule 59 Motion on May 12, 1987, that converted Judge Hinton's Order entered on May 4, 1987, into an Interlocutory Order.

A motion pursuant to CR 59 converts a final judgment to an Interlocutory Judgment, and a judgment which is dispositive of the issues raised in the CR 59 Motion re-adjudicates all prior Interlocutory Orders and Judgments determining claims which are not specifically disposed of in the latter Judgment; therefore, an objection raised in a CR 59.05 Motion would be timely, and would not constitute a waiver on appeal. *State Personnel Board v. Howell*, 725 S.W. 2d 14 (KY CA 1986)

The Kentucky Court of Appeals said, "It considered the Petition for Writ of Mandamus and the Response thereto." (App P. 17a)

The Petition for Writ of Mandamus concerns the performance of an official act, by Judge Hinton in Kenton Circuit Court Case No. 86-CI-1266.^{15, 16} and the relief sought was the performance of that official act. (App. P. 3a, 8a)

Rule 4.300. Code of Judicial Conduct — require

Canon 1: A judge should uphold the integrity and independence of the judiciary.

Writ of Mandamus (page 13-14), was not a response to the Petition for Writ of Mandamus. Page 13 is a copy of the Notice from the Clerk of the Court of Appeals, dated August 15, 1987, that Petitioner's Petition for Writ of had been filed. Page 14 is a copy of one of Judge Hinton Orders that the Kenton Circuit Clerk entered on May 4, 1987. (NR 22, App. P. 13a). The suggestion that Judge Hinton filed a Response to the Petition for Writ of Mandamus is not in good faith, and was not made by Judge Hinton or Counsel for the City of Covington. (real party in interest). Put another way, it is a misprision by the Clerk of the Kentucky Court of Appeals. The Court of Appeals as well as the Kentucky Supreme Court recognized the error by the Clerk of the Court of Appeals. Both Courts declined to correct the error.

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2: A judge should avoid impropriety and the appearance of impropriety in all his activities.

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the *prestige of his office to advance the private interests of others: nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.*

Canon 3: A judge should perform the duties of his office impartially and diligently.

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties the following standards apply:

A. **Adjudicative responsibilities**

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interest, public clamor, or fear of criticism.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, *neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding.*

(5) A judge should dispose promptly of the business of the court.

B. Adminsittrative responsibilities

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge becomes aware.

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary fact concerning the proceeding;

(d)(ii) He is acting as a lawyer in the proceeding;

(d)(iv) He is to the judge's knowledge likely to be a material witness in the proceedings;

As a result of the hearing held on January 14, 1987, Judge Hinton knew that because of the federal judgment of "dismissal without prejudice,"¹ the City of Covington was collateral estoppel from denying a contract existed, the City had illegally withheld the rent and the City could not claim res judicata.

On elementary grounds that, by definition, a previous disposition expressly effected without prejudice cannot be res judicata. *Markow v. American Bay Colony, Inc.*, 478 So. 2d 413

When a state court refuses full faith and credit to the judgment . . . because of its opinion of the nature of the cause of action, or judgment in which it is merged, an asserted federal right is denied and the sufficiency of the grounds of denial are for the Supreme Court of the United States to decide. *Titus v. Wallick*, 306 U.S. 282

By the constitutional provision for full faith and credit, the local doctrines of res judicata, speaking generally, becomes a part of national jurisprudence. *Durfee v. Duke*, 375 U.S. 106, 109, 11 L Ed 2d 186, 190, 84 S Ct 242

"The power of a state to determine the limits of the jurisdiction of its courts and the character of the controversies which shall be heard in them is, of course, subject to the restrictions imposed by the federal constitution." . . . (Cite omitted). "The contract clause, the full faith and credit clause, the privileges or immunities clause all fetter the freedom of a state to deny access to its court however much it may regard such withdrawal of jurisdiction, the adjective law, or to exercise of its right to regulate the practice and procedure of its courts." . . . (Cite omitted). "A state cannot escape its constitutional obligation by simple devise of denying jurisdiction in such cases to courts otherwise competent."

. . . (Cites omitted) . . . "Whatever springs the state may set for those who are endeavoring to assert rights that the state confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice," . . . (Cite omitted) . . . "But, whether the claims are based on a federal right or merely of local concern is itself a federal question on which this court, and not (the Kentucky

Supreme Court), has the last say. That court could not put a federal claim aside, as though it was not in litigation, by the talismanic word 'jurisdiction.' When an asserted federal right is denied, the sufficiency of the grounds of denial is for this court to decide. . . . (Cite omitted) *Angel v. Bullington*, 330 U.S. 183, 186, 91 L Ed 832

The Kentucky Court of Appeals denied the Petition, (App. P. 17a), in an Order, referencing to, "original action in Court of Appeals regarding Fleming Circuit Court" said, "The Fleming Circuit Court's May 4, 1987 order disposed of all pending claims in that action and was final and appealable. CR 54.02.

Judge Hinton's Order of May 4, 1987, became interlocutory, when Petitioner filed a Rule 59.05 Motion on May 12, 1987, but going beyond that, the question of whether, "The Fleming-Circuit Court's May 4, 1987 order disposed of all pending claims in that action and was final and appealable," CR 54.02, was not before the Kentucky Court of Appeals on September 28, 1988.

Neither was there any action regarding the Fleming Circuit Court. Petitioner contends that the appointment of Judge Hinton by Judge Lape is unconstitutional.^{3 and 4}

The City of Covington nor their counsel of record, Mr. McDermott, has made an appearance in this case as required by law¹⁶ Any effort to ascribe to the Honorable Judge Hinton the filing of the May 4, 1987 order of Judge Hinton as "Response of Judge to Petition for Writ of Mandamus"¹⁷ is a violation of KY SCR 4.300 Code of Judicial Conduct, Canon 1; Canon 2: A., B.; Canon 3: A Adjudicative Responsibilites (1), (3), (4), (5); B. Administrative Responsibilities, (1), (2), (3); C. Disqualification (1), (a), (d)(ii), (d)(iv).

The Decision of the Kentucky Court of Appeal is clearly erroneous. It is contrary to the only evidence present. (Petition for Writ of Mandamus, App. P. 3a) and is based upon a

misapplication of the law.^{15, 16} and a substantial error in the proceedings. (purported Response of Judge to Petition for Writ of Mandamus) (App. P. 9a, 10a)

The Kentucky Supreme Court corrected the misprison in the Court of Appeals Order (regarding Fleming Circuit Court, App. P. 19a) by inserting (Kenton Circuit Court, 86-CI-1266). This was an admission that the Court of Appeals was in error. That also raises the question of where did the Kentucky Supreme Court get its facts? Respondent, (counsel for the real party in interest Mr. McDermott) did not file as required by Ky. Rules of Civil Procedure, CR 76.37(7h).¹⁶

In its unpublished opinion, the Kentucky Supreme Court said:

Thompson, Pro Se, (Petitioner) presents the following questions: (1) Does a timely motion filed pursuant to CR 59 stay the execution of proceedings to enforce a judgment, (2) Was a valid response to the Petition for (Writ of) Mandamus filed.

The Ky. Supreme Court answered neither question. Instead the Kentucky Supreme Court said:

This case is a Kenton Circuit Court matter in which a special judge from Fleming County presided. The special judge issued Findings of Fact that Plaintiff had alleged the same facts in a suit in the U.S. District Court on May 4, 1987, the special judge rendered an order that the matter was res judicata. Subsequently, Thompson sought Mandamus. (App. P 19a)

The issue as stated above by the Kentucky Supreme Court is not the issue presented to the Kentucky Court of Appeals in the Petition for Writ of Mandamus. (App. P. 3a), or on appeal to the Kentucky Supreme Court.

Issue not raised in the Court of Appeals was not properly

before the Supreme Court. *Foremost Ins. Co. v. Shepard*, 588 S.W. 2d 468 (KY SC 1979)

The only way the issue of whether, "the May 4, 1987 order disposed of all pending claims in that action was final and appealable," could get before the Kentucky Court of Appeals is that Petitioner would have appealed that decision. Once Petitioner filed a Rule 59 Motion on May 12, 1987, that converted the May 4, 1987 Order into an Interlocutory Order until Judge Hinton ruled on the Rule 59 Motion. *State Personnel Board v. Howell*, 725 S.W. 2d 14 (KY CA 1986)

Judge Hinton never ruled on the Rule 59 Motion, which was a violation of K.R.S. 454.350.¹⁵

In the brief to the Kentucky Supreme Court, required by KY Rules of Civil Procedure, Petitioner informed the Kentucky Supreme Court, that no Response to the Petition for Writ of Mandamus had been filed in the Kentucky Court of Appeals, and the Clerk of the Court of Appeals accepting and filing a copy of the Order, entered on May 4, 1987, in the Kenton Circuit Court as a Response was fraud upon Petition and the Court.

The City of Covington did not file the brief required by KY CR 76.36(7)(h).

Under Kentucky law,

Where Appellee did not file Brief, the Appellate Court considered the Appellant's Statement of Facts and Issues to be correct. *Callahan v. Callahan*, 579 S.W. 2d 385 (KY App. 1979)

It is clear that Petitioner cannot appeal the May 4, 1987 Order NR 22 (App. P. 13a) until Judge Hinton rules on the Rule 59 Motion, filed on May 12, 1987. (See Pet. for Writ of Mandamus, App. P. 3a). Liberally construed, denying or granting the relief sought in the Rule 59 Motion would make the May 4, 1987 Order final and appealable.

Judge Hinton knows that a federal judgment dismissed without prejudice is not res judicata. Judge Hinton knew Petitioner was entitled to relief and would appeal had Judge Hinton entered an adverse ruling on the Rule 59 Motion. Petitioner may not be entitled to a Writ of Mandamus telling Judge Hinton which way to rule on the Rule 59 Motion, but Petitioner is entitled to an Order compelling Judge Hinton to rule on the Rule 59 Motion.

Although in dicta, the Kentucky Supreme Court observed: "A timely motion pursuant to CR 59, in this case CR 59.05, should be ruled upon if properly presented." No finding was made that Petitioner's Rule 59 Motion was not properly presented, nor is there any argument by the City of Covington (real party in interest) and Judge Hinton that Petitioner is not entitled to the present Petition for Writ of Mandamus. Judge Hinton knew that his decision that a dismissal of the federal suit "without prejudice" was res judicata, was clearly erroneous. But Judge Hinton also knew that as long as he (Judge Hinton) didn't rule on the Rule 59 Motion, Petitioner could not appeal. Judge Hinton did not originally intend for Petitioner to have a copy of his April 4, 1987 Order. See letter of April 4, 1987. (App.-P. 15a)

The Kentucky Supreme Court dispensed with Oral arguments in this case based on CR 76.16(4). The main reason was that it was clear that petitioner was entitled to the relief sought.

CR 76.16(4) provides — A person who is not an attorney will be permitted to make oral argument only with special leave of court.

This Rule conflicts with:

(1) KRS 4.300 Canon 3: (4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law.

(2) Kentucky Constitution § 1, Sixth: The right of assembling together in a peaceable manner for their common

good, and of applying to those invested with the power of government for redress of grievances or other proper purposes, by petition, address or remonstrance.

(3) Kentucky Constitution § 14: *All Courts* shall be open, and every person for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay.

(4) 28 U.S.C. § 1654: In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such Courts, respectively, are permitted to manage and conduct causes therein.

(5) First Amendment, U.S. Const.: Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or the press; or the right of the people peaceably to assemble, or to petition the Government for a redress of grievances.

The Court of Appeals abused its discretion by basing its decision on improper and inadmissible *ex parte* communications. (*The Purported Response of Judge to the Petition for Writ of Mandamus*, App. P. 9a-10a). *Commonwealth v. Peacock*, 701 S.W. 2d 397, 398⁴ (KY SC 1985)

The Decisions of the Kentucky Supreme Court and the Kentucky Court of Appeals were clearly erroneous. Petitioner is entitled to a decision on the merits of his complaint. (App. P. 19a)

The issue of denial of access to court is also present in *Thompson v. Lape*, 88-2028 and *Thompson v. City of Covington, et al.*, 88-1965. In addition to appointing Judge Hinton in this case, Judge Lape appointed Judge Arnold in 88-1965. Justice must satisfy the appearance of Justice. *In re Murchison*, 349 U.S. 133.

CONCLUSION

Wherefore, Petitioner prays this Court:

- (1) Reverse the unpublished decision of the Kentucky Supreme Court.
- (2) Remand to the Kentucky Court of Appeals with instructions that an Order be entered; compelling Kenton Circuit Court (Judge Hinton) to enter a ruling on Petitioner's timely presented Rule 59 Motion and to enter his (Judge Hinton's) findings of fact and conclusions of law on the four (4) hearings held.
- (3) Petitioner recover all his costs herein expended as well as a reasonable attorney fees.

Eddie Thompson, Jr., Pro Se

AFFIDAVIT OF PROOF OF SERVICE

Comes now Eddie Thompson, Jr., Petitioner herein, first being duly cautioned and sworn and states as follows: On September ___, 1989, I deposited in a United States Post Office, three (3) copies of the instant Petition for Writ of Certiorari, in duly addressed envelopes, with first class postage prepaid to: Honorable Richard L. Hinton, Fleming Circuit Court, Court House, Flemingsburg, Ky. 41041; Mr. Howard Hodge, Mr. Ronald McDermott, Assistant City Solicitor, Mr. Joseph Condit, City Solicitor, 18 Pike Street, Covington, Ky. 41011, Honorable Raymond E. Lape, Jr., Chief Regional Judge, 5th Floor, County Building, Covington, Ky. 41011, Mr. John Scott, Clerk, Kentucky Supreme Court, Capitol Building, Frankfort, Ky. 40601; Mr. Frederic Cowan, Kentucky Attorney General, Capitol Building, Frankfort, Ky. 40601; The Solicitor General, Department of Justice, Washington; D.C. 20530.

Eddie Thompson, Jr.

Subscribed and sworn to before me this ___ day of September, 1989.

My Commission expires

NOTARY

APPENDIX

COURT OF APPEALS OF KENTUCKY

FILE NO. 88-CA-1726-OA

EDDIE THOMPSON, JR.

Petitioner

vs.

**RICHARD L. HINTON, JUDGE,
FLEMING CIRCUIT COURT**

Respondent

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COURT OF APPEALS OF KENTUCKY

FILE NO. 88-CA-1726-OA

EDDIE THOMPSON, JR.

Petitioner

vs.

RICHARD L. HINTON, JUDGE,
FLEMING CIRCUIT COURT

Respondent

CERTIFICATION

I, John C. Scott, Clerk, do hereby certify that the foregoing is the true, complete and original of the original proceedings as filed and decided by this Court.

Done this 2nd day of November, 1988, at Frankfort, Kentucky.

JOHN C. SCOTT, CLERK

By: /s/ JEANETTE MULLEY
Chief Deputy Clerk

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

FILE NO. _____

EDDIE THOMPSON, JR.

Petitioner

vs.

HON. RICHARD L. HINTON
SPECIAL JUDGE

Respondent

PETITION FOR WRIT OF MANDAMUS

(Filed August 15, 1988)

CERTIFICATION:

I hereby certify that a true and correct copy of the foregoing Petition For Writ of Mandamus was mailed, postage prepaid, this 15th day of August, 1988, to the Honorable Richard L. Hinton, Judge, Fleming Circuit Court, Court House, Flemingsburg, Ky. 41041; Mr. Howard Hodge, Mr. Ronald L. McDermott, and Mr. Joseph Condit, City Solicitor, all at 18 Pike Street, Covington, Ky. 41011, Honorable Raymond Lape, Chief Regional Judge, City-County Bldg., Covington, Ky. 41011.

/s/ EDDIE THOMPSON, JR.
P.O. Box 1221
Covington, Ky 41012
(606)-491-6278

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

FILE NO. 88-CA-1726

EDDIE THOMPSON, JR.

Petitioner

vs.

HON. RICHARD L. HINTON
SPECIAL JUDGE

Respondent

PETITION FOR WRIT OF MANDAMUS

Petitioner, pursuant to the provisions of Kentucky Civil Rule 76.36, respectfully pray that this Honorable Court issue a Writ of Mandamus to the Honorable Richard L. Hinton, Special Judge, to show cause, if there be any, why he refuses to issue a final and appealable ORDER AND JUDGMENT in a case styled Eddie Thompson, Jr. v. City of Covington and Howard, Director of Housing, 86-CI-1266, as provided in KRS 454.350.

As grounds therefor, Petitioner, first being duly Cautioned and sworn and states as follows;

- (1) On June 15, 1988, I informed the Honorable Judge Hinton by letter that he has neglected to entered a final APPEALABLE ORDER in the aforementioned case. Ex. A.
- (2) I re-aver and re-affirm each and every statement in the letter I wrote Judge Hinton on June 15, 1988.
- (3) In spite of repeated request, Judge Hinton still refuses to enter a final appealable ORDER.
- (4) Judge Hinton refusal to enter a final and appealable ORDER is a violation of KRS 454.350.

/s/ EDDIE THOMPSON, JR.

Subscribed and sworn to before me this 15th date of August, 1988.

3/16/92

/s/ ISIAH SMITH

My commission expires

Notary

Wherefore, Petitioner, pray;

- (1) The Court ORDER THE Honorable Judge Hinton to enter a final appealable Order Pursuant to KRS 454.350, with due regards for Civil Rules 52 and 58
- (2) For his cost herein expended.
- (3) For all other good and proper relief he may be entitled to.

/s/ EDDIE THOMPSON, JR.

QUESTION PRESENTED

Can a Circuit Judge (Special Judge) hold four (4) separate hearing over a year and eight (8) month period of time and not render a final appealable Judgment in a Case?

Under statute setting forth time within which Judge, Commissioner or hearing officer must issue judgment or report certification of reason delay occurs, to avoid prolonged indecision, mandatory writ should be used to rectify situation and if this be to no avail, then extreme remedy of removal is Provided. KRS 454.350 Dubick v. Dubick 652 S.W. 2d 652 (CA Ky 1983)

Mandamus is an extraordinary remedy that lies to confine a lower court to stay within its jurisdiction or to compel it to perform ministerial functions Weber v. Coney 642 F 2d 91

/s/ EDDIE THOMPSON, JR.

EXHIBIT A
June 15, 1988

Hon. Richard L. Hinton
Fleming Circuit Judge
Courthouse
Flemingsburg, Ky. 41041

Refer: Eddie Thompson, Jr. vs. City of Covington, Howard Hodge

Honorable Judge Hinton;

Your HONOR, I write this letter out of my concerns that you may be neglecting to enter a final appealable order in this case. It may be that you have overlooked it in your busy schedule. For that reason, I will attempt to bring you up to date. On September 23, 1986, over my objects, you were assigned this case as a special Judge, presumably because all Kenton Circuit Judges are prejudice. You held a hearing on January 14, 1987. At the hearing Mr. McDermott admitted, (1) his motion was not well grounded, (2) the complaint stated a cause of action, (3) the court had jurisdiction, and (4) no court had made a decision on the merits of the case (that being a contract between plaintiff and the City of Covington). You questioned Mr. McDermott as to what a DISMISSAL WITHOUT PREJUDICE MEANT. When Mr. McDermott did not give you a sufficient answer, you orally ordered Mr. McDermott and plaintiff (myself) to file a memorandum of law relative to essence of a DISMISSAL WITHOUT PREJUDICE. You also permitted Mr. McDermott to amend the original ANSWER without showing any reason for his neglect. Because Mr. McDermott's were not in good faith, plaintiff requested by written motion, the court to enter it's FINDINGS OF FACTS AND CONCLUSIONS OF LAW on the hearing held on January 14, 1987. You refused to grant that request. In disobediences to your oral order to file a memorandum of law relevant to a DISMISSAL WITHOUT PREJUDICE, Mr. McDermott filed another MOTION TO DISMISS & PRE-TRIAL MEMORANDUM.

Mr. McDermott completely ignored your instructions. In the MOTION TO DISMISS & PRE-TRIAL MEMORANDUM, Mr. McDermott said, inter alia, "Counsel for defendant does not know whether or not we are alleging a breach of contract or some type of racial discrimination suit, and respectfully requests the court for an order requiring the plaintiff to clarify his pleadings".

Plaintiff filed a memorandum of law containing 9 US Supreme Court decisions standing for the proposition that a DISMISSAL WITHOUT PREJUDICE is not a decision on the Merits. At the hearing on April 22, 1987, where Mr. McDermott was unable to give you, as you, as you phrased it at the January 14, 1987 hearing, "SOMETHING TO WORK WITH", YOU SAID, "You guess you would have to set the matter down for trial", I object to a trial, claiming I was entitled to a default judgment, because (1) defendant did not reply to motion for default judgment, (2) defendant failed to answer the complaint, (3) the DISMISSAL WITHOUT PREJUDICE precluded defendants from claiming RES JUDICATA.

On May 4, 1987, the court entered finding of fact, conclusions of law and order. Because the order did not comply with K.R.S. 454.095, (cause of action to be stated in judgment), I file a motion for you to amend to conform to the proof in this case and/or enter an appealable order. You held another hearing on July 14, 1987, where I gave you all the facts of the case. Mr. McDermott made no effort to contradict any facts of this case. You had a Court Reporter to take these Proceedings down, yet you entered no order. On November 17, 1987, I filed a motion for a judgment for plaintiff and/or a motion for final and appealable Order. Even though I asked for no other hearing, a hearing was scheduled for late December, 1987, but canceled. On February 28 1988 you held a hearing where I informed you of the facts upon which I am entitled to a favorable Judgment. You asked Mr. McDermott if he had anything contra to offer. Mr. McDermott said, "NO". At that hearing you said, "You were "were sticking to my original decision (res judicata)". I reminded

you that I had cited nine (9) US Supreme Court Cases to support my position that a DISMISSAL WITHOUT PREJUDICE is not a decision on the merits and asked; If you insist on making an erroneous decision to cite at least one case to support your position on the law of this case, so that on appeal your position before the law may be clear.

As of today, you have not filed an order overruling my motion of May 12, 1987 to amend your Order of May 4, 1987.

There may be little room, for differences of opinions as to your handling of this case, but I hope you can understand my position. I believe, at least, I am entitled to the entry of an order and judgment, with finding of facts and conclusions of law, so that I may proceed with my rights.

I would appreciate an entry upon the records of the Kenton Circuit Court within 10 Days.

Yours Truly,
/s/ EDDIE THOMPSON, JR.
P.O. Box 1221
Covington, Ky. 41011
(606)-491-6278

CC

Hon. Judge Raymond Lape, Chief Regional Judge,
Six Region
Mr. Kenneth Parker, Court Administer

[LETTERHEAD OF
OFFICE OF CLERK OF COURT OF APPEALS
Frankfort, Kentucky 40601]

08/15/88

EDDIE THOMPSON JR
P.O. Box 1221
COVINGTON KY 41012

FILE NO. 88-CA-001726

EDDIE THOMPSON, JR.

Petitioner

vs.

RICHARD L. HINTON JUDGE
FLEMING CIRCUIT COURT

Respondent

(Filed August 23, 1988)

THE PETITIONER'S PETITION FOR WRIT OF MANDAMUS HAS BEEN DOCKETED IN THIS OFFICE AS OF THE ABOVE DATE.

PURSUANT TO CR 76.36(2), THE RESPONDENT HAS TEN (10) DAYS IN WHICH TO FILE ANY RESPONSE. UPON RECEIPT OF SUCH RESPONSE, ALL PAPERS WILL BE SUBMITTED TO THE COURT FOR CONSIDERATION.

SINCERELY,
JOHN C. SCOTT, CLERK
BY: /s/ ROBIN THOMPSON
DEPUTY CLERK

CC:
RICHARD HINTON
FILE COPY

[Page 1 of Purported Response of Judge to
Petition for Writ of Mandamus]

COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
SECOND DIVISION

CASE NO. 86-CI-1266

EDDIE THOMPSON, JR.

Plaintiff

vs.

CITY OF COVINGTON, ET AL.

Defendants

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER
(Filed May 4, 1987)

FINDINGS OF FACT

Plaintiff alleged same facts in suit styled Eddie Thompson, Jr. vs. June Hedrick and Joseph Condit, United States District Court, Eastern District of Kentucky, Covington, No. 78-5.

CONCLUSIONS OF LAW

Plaintiff was required in that suit to assert all claims.

ORDER

This matter is res judicata.

/s/ RICHARD L. HINTON
SPECIAL JUDGE
P.O. Box 405
Flemingsburg, Kentucky 41041
(606) 845-8811

DATED: April 29, 1987

[Page 2 of Purported Response of Judge to
Petition for Writ of Mandamus]

CERTIFICATION

I, Ed F. Schroeder, Clerk of Kenton Circuit Court do hereby certify that this is a true and correct copy of Findings of Fact, Conclusions of Law and Order and that I have this 4th day of May, 1987 mailed copies to Hon. Ronald L. McDermott, 27 E. 4th St., Cov., Ky. 41011; and Eddie Thompson, Jr., P.O. Box 1221, Cov., Ky. 41012.

ED F. SCHROEDER, CLERK
By: /s/ JUDY STAHL, D.C.

COMMONWEALTH OF KENTUCKY
COURT OF JUSTICE
SECOND DIVISION

CIVIL DOCKET

Case No. 86-CI-1266
Judge 616021
Court 616100
County KENTON

Plaintiff
EDDIE THOMPSON, JR.

Defendant
CITY OF COVINGTON
HOWARD HODGE, Dirc. of Housing for City of Cov.

Jury Demand (X)	\$25.00 (I 256796)
	\$81.00 (I 256689)

Attorney
EDDIE THOMPSON, JR. pro se
P.O. Box 1221
Covington, KY. 41012
[DULY CERTIFIED]

Date	Item	Proceeding
8/01/86	1	Complaint filed; summons and 2 copies issued Kenton Co.
8/06/86	2	Civil summons returned served on City of Covington by serving Joseph Condit, City Solicitor by D. S. Radenheimer.
8/06/86	3	Civil summons returned served on Howard

Hodge, Director of Housing of Covington
by D. S. Radenheimer.

8/19/86 4 Deft. moves to dismiss.

9/05/86 5 Pltff. filed reply to motion to dismiss.

9/23/86 6 Order certifying need for special judge.

7 Assignment of Special Judge Richard L.
Hinton. Copy to Attys. of record and Eddie
Thompson pro se.

10/14/86 8 Answer of City of Covington and Howard
Hodge.

9 Defts. move to Amend. Copy to Judge
Hinton.

10/27/86 10 Pltff. filed reply to Deft's answer. Copy to
Judge Hinton.

11/12/86 11 Pltff. moves for Default Judgment, Copy
to Judge Hinton.

11/18/86 12 Order setting for hearing on 1/14/87 — 10
A.M. Copy to Hon. Ron. McDermott and
Mr. Eddie Thompson Jr.

1/20/87 13 Pltff. moves to enter its Fact and Conclusions
of law on the hearing held on
1/14/87.

14 Objections to Defts. being permitted to file
an answer out of time filed by Pltff.

1/21/87 15 Amended Answer filed. Copy Judge Hinton.

2/10/87 16 Pltff. moves to dismiss.

2/13/87 17 Memorandum of Pltff. filed.

3/09/87 18 Order setting for hearing on 4/22/87 —
1:30 P.M.

4/22/87 19 Tapes of hearing filed. (2)

4/27/87 20 Claim for Damages filed by Pltff.

21 Authorities cited filed by Pltff.

5/04/87 22 Findings of Fact, Conclusions and Order
that matter in suit in U.S. Dist. Court is res
judicata. Copy certified to Eddie Thompson,
Jr. pro se and Hon. Ronald McDermott.

- 23 Findings of Fact, Conclusions and Order
that Deft. City of Covington is permitted
to answer. Copy to Hon. Ron. McDermott
and Eddie Thompson, Jr.
- 5/12/87 24 Pltff. moves to Amend Order to Conform
to the Proof in this Case and/or Motion for
the Court to Enter an Appealable Order.
- 6/26/87 25 Order setting for hearing on 7/14/87 — 12
noon.
- 7/31/87 26 Pltf. moves to file a copy of pre-trial
Transcript filed in U.S. Dist. Court,
Eastern District of Ky. Copy to Special
Judge.
- 10/13/87 27 Order granting Eddie Thompson leave to
file copy of pre-trial conference and brief.
Copy mailed to Hon. Ron. L. McDermott
and Eddie Thompson Jr. Brief filed. Pre-
Trial Conference filed.
- 11/17/87 28 Plaintiff. moves for a Judgment for Plaintiff.
and/or motion for Final and Appealable
Order. Copy to Special Judge.
- 3/23/88 29 Order setting for hearing on 2/28/88 — 2
P.M.

[LETTERHEAD OF RICHARD L. HINTON, JUDGE]

April 27, 1987
(Filed May 4, 1987)

Mr. Ed F. Schroeder, Clerk
Kenton Circuit Court
City-County Building
Covington, Kentucky 41011

Dear Mr. Schroeder:

Re: Eddie Thompson, Jr. vs. City of
Covington, et al., Kenton Circuit Court,
Second Division, Case No. 86-CI-1266

Please give notice of order and summary judgment to the
attorneys of record.

Please file in case items marked 1, 2 & 3.

Thank you very much.

Very truly yours,
/s/ RICHARD L. HINTON
Special Judge

RLH: lmr
Enclosures

[DULY CERTIFIED]

COMMONWEALTH OF KENTUCKY
KENTON CIRCUIT COURT
SECOND DIVISION

CASE NO. 86-CI-1266

EDDIE THOMPSON, JR.

Plaintiff

vs.

CITY OF COVINGTON, ET AL.

Defendants

**FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER**
(Filed May 4, 1987)

FINDINGS OF FACT

Pursuant to hearing held January 14, 1987, the Court makes the following findings:

Defendant City of Covington is represented by same attorney as defendant Howard Hodge and motion filed by defendant Howard Hodge was for both defendants but through a typing error, an "s" was left off "defendants".

CONCLUSIONS OF LAW

Defendant City of Covington should be allowed to answer.

ORDER

Defendant City of Covington is permitted to answer.

/s/ RICHARD L. HINTON,
SPECIAL JUDGE
P.O. Box 405
Flemingsburg, Kentucky 41041
(606) 845-8811

DATED: April 30, 1987

[DULY CERTIFIED]

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 88-CA-1726-OA

EDDIE THOMPSON, JR.

Petitioner

vs.

RICHARD L. HINTON, JUDGE
FLEMING CIRCUIT COURT

Respondent

ORIGINAL ACTION IN COURT OF APPEALS
REGARDING FLEMING CIRCUIT COURT

ORDER

BEFORE: HOWERTON, CHIEF JUDGE; COMBS AND
McDONALD, JUDGES.

Having considered the petition for writ of mandamus, and the response thereto, and being otherwise sufficiently advised, the Court ORDERS the motion be, and it is hereby, DENIED. The Fleming Circuit Court's May 4, 1987 order disposed of all pending claims in that action and was final and appealable. CR 54.02.

ENTERED: September 28, 1988

/s/ J. W. HOWERTON
CHIEF JUDGE,
COURT OF APPEALS

SUPREME COURT OF KENTUCKY

88-SC-781-MR

EDDIE THOMPSON, JR.

Appellant

vs.

RICHARD L. HINTON, JUDGE
FLEMING CIRCUIT COURT

Appellee

ORDER DISPENSING WITH ORAL ARGUMENT
COURT OF APPEALS, 88-CA-1726-OA
(Kenton Circuit Court, 86-CI-1266)

Pursuant to CR 76.16 it is directed that this appeal be submitted on the briefs without oral argument.

ENTERED: May 30, 1989.

/s/ ROBERT F. STEPHENS
Chief Justice

RENDERED: June 29, 1989
NOT TO BE PUBLISHED

SUPRÈME COURT OF KENTUCKY

88-SC-781-MR

EDDIE THOMPSON, JR.

Appellant

vs.

RICHARD L. HINTON, JUDGE
FLEMING CIRCUIT COURT

Appellee

MEMORANDUM OPINION OF THE COURT
COURT OF APPEALS, 88-CA-1726-OA
(Kenton Circuit Court, 86-CI-1266)

AFFIRMING

This appeal is from an order of the Court of Appeals which denied a writ of mandamus.

Thompson, *pro se*, presents the following questions: 1) Does a timely motion filed pursuant to CR 59 stay the execution of proceedings to enforce a judgment. 2) Was a valid response to the petition for mandamus filed.

This case is a Kenton Circuit Court matter in which a special judge from Fleming County presided. The special judge issued findings of fact that the plaintiff had alleged the same facts in a suit in the U.S. District Court and on May 4, 1987, the special judge rendered an order that the matter was *res judicata*. Subsequently, Thompson sought mandamus. On September 28, 1988, the Court of Appeals determined that the circuit court order disposed of all pending claims in that

action and was final and appealable. Thompson appealed from the Court of Appeals order of September 28, 1988.

A careful examination of the record before this Court indicates that the Court of Appeals order was proper in that it was based on the record presented to it.

In this appeal, Thompson now argues that a timely motion pursuant to CR 59 was never ruled on by the special circuit judge. Thompson now submits to this Court a copy of part of the circuit court docket sheet which indicates that "A motion to amend order to conform to the proof in this case and/or motion for the court to enter an appealable order" was filed on May 12, 1987. Pertinent parts of the circuit court record were not transmitted by Thompson to either the Court of Appeals or this Court. The burden of proof is on the petitioner. The record before this Court and the record presented to the Court of Appeals does not disclose any circuit court record indicating that a timely motion pursuant to CR 59 was ever filed or ever ruled on. This Court cannot depart from the record. Consequently, the order of the Court of Appeals is affirmed.

Although it is dicta, this Court observes, for the benefit of the *pro se*, that a timely motion filed pursuant to CR 59, in this case CR 59.05, should be ruled upon if properly presented. The response by the special circuit judge was only a copy of the order of May 4, 1987. The nature of the response is of no consequence in regard to mandamus.

The writ of prohibition is a drastic and extraordinary form of equitable relief and is utilized only when there is a clear showing of immediate and irreparable injury. The proceedings are discretionary and relief will not be granted except where the situation is so exceptional that no other remedy is available. That is not the situation in this case. If the order appealed from is erroneous a writ of mandamus or prohibition will not be entertained if there is an adequate remedy by appeal.

- We determine that there is no irreparable injury and there is an adequate remedy by appeal.

The order of the Court of Appeals is affirmed.
All concur.

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